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Closing Argument: Addressing Damages in Aviation Wrongful Death Cases

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CLOSING ARGUMENT: ADDRESSING DAMAGES IN AVIATION WRONGFUL DEATH CASES

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I. INTRODUCTION

"Would one dollar per hour for that kind of suffering be too high?"

"Isn't this man's life worth more than his salary?"

"How would you feel if you were in the same situation as my client?"

"At some point we need to take responsibility for our own actions instead of looking to someone else to compensate us for our error."

HOW DO YOU ARGUE damages in an aviation wrongful death case? What *can* you argue? What *shouldn't* you argue? If you are the defense attorney, should you even argue damages? In every aviation accident case, particularly in a catastrophic injury or wrongful death case, plaintiff and defense counsel must give considerable thought to the development of their respective damages strategies. A trial typically seeks a resolution of two competing interests. The first is the plaintiff's interest in finding the defense liable to the greatest extent possible by law. The second interest is the defense's interest in exonerating the client or, at the very least, minimizing its exposure. To meet these goals, some attorneys have pushed the limit when arguing damages in closing, and some, in the eyes of the appellate courts, have crossed the line. This paper discusses those limits and other issues relevant to closing argument in the aviation wrongful death context.

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II. WHAT IS (AND IS NOT) ACCEPTABLE CONTENT FOR CLOSING

The scope of closing argument in most jurisdictions is within "the sound discretion of the trial court."[1] Counsel is allowed broad latitude in drawing reasonable inferences and conclusions from the evidence. Improper comments generally do not constitute reversible error unless the other party has been substantially prejudiced so as to be denied a fair trial.[2] The following discussion illustrates some of those comments in closing argument that perhaps come dangerously close to the line, and those which certainly result in reversal on appeal.

A. Per Diem Compensation Arguments

Aviation wrongful death cases, by their very nature, typically involve gruesome manners of death, either by thermal injuries, severe trauma, or both. Moreover, in many cases there may be some evidence that the pilot and passengers were aware of the problem with the aircraft during the flight and before impact. This, of course, raises pain and suffering issues, from pre-impact to post-impact pain and suffering.

One often considered argument for pain and suffering damages as the *per diem* argument. A *per diem* argument, also known as a formula argument, "is made when the plaintiff requests a lump sum amount for future pain and suffering damages."[3] This lump sum is then divided by the number of time units expected in a plaintiff's life to equal a price of pain per unit.[4] Both plaintiff and defense counsel should consider the benefits and the risks of arguing that the amount plaintiff is seeking is equivalent to a certain amount of money each day.

A leading case analyzing whether the formula technique should be allowed in closing arguments is *Botta v. Brunner*.[5] In *Botta*, the New Jersey Supreme Court prohibited the use of the formula technique, finding that the arguments invaded the province of the jury, were speculative, and were not supported by evidence.[6] The *Botta* court forbade the mention or request of

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[1] Golian v. Wollschlager, 893 So. 2d 666, 667 (Fla. Dist. Ct. App. 2005).

[2] Tanner v. Beck, 907 So. 2d 1190, 1196 (Fl. Dist. Ct. App. 2005).

[3] Craig Lee Montz, *Why Lawyers Continue to Cross the Line in Closing Argument: An Examination of Federal and State Cases*, 28 Ohio N.U. L. Rev. 67, 123 (2001) (quoting Wilson v. Williams, 933 P.2d 757, 758–59 (Kan. 1997)).

[4] *Id.*

[5] 138 A.2d 713 (N.J. 1958).

[6] *Id.* at 723–25.

any amount of future pain and suffering damages by the plaintiff's attorney, condemning his argument to the jury asking, "[w]ould fifty cents an hour for that kind of suffering be too high?"[7]

The Supreme Court of Illinois has held that a *per diem* argument discourages "reasonable and practical consideration[s]" on the part of the jury.[8]

> Jurors are as familiar with pain and suffering and with money as are counsel. . . . [A]n impartial jury which has been properly informed by the evidence and the court's instructions will, by the exercise of its conscience and sound judgment, be better able to determine reasonable compensation than it would if it were subjected to expressions of counsels' partisan conscience and judgment on the matter.[9]

On the other hand, Florida courts seem to be amenable to the *per diem* approach. In *Allred v. Chittenden Pool Supply, Inc.*,[10] the Florida Supreme Court stated, "[a]rgument of a plaintiff's counsel to the jury regarding various elements of damages, especially where pain and suffering are involved, based on a mathematical formula of calculable value or on a per diem basis may be helpful to the jury in its final deliberations."[11] Such a ruling is echoed in *Payne v. Alvarez*,[12] where an appellate court in Florida permitted the plaintiff to use an argument suggesting to the jury an amount which should be allowed for pain and suffering on a *per diem* basis.[13]

Obviously, the law on pain and suffering depends on jurisdiction. As a result, it is important for counsel to research the law of the jurisdiction and any personal preferences of the judge to determine whether a *per diem* argument is permitted and whether such an argument would be wise in that court, before that judge, and presented to those jurors.

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[7] *Id.* at 718.

[8] Caley v. Manicke, 182 N.E.2d 206, 208 (Ill. 1962).

[9] *Id.* at 209.

[10] 298 So. 2d 361 (Fla. 1974).

[11] *Id.* at 365.

[12] 156 So. 2d 659 (Fla. Dist. Ct. App. 1963).

[13] *Id.* at 660–61; *see also* Heddendorf v. Joyce, 178 So. 2d 126, 130 (Fla. Dist. Ct. App. 1965) (Although generally within the trial court's discretion in Florida, a trial court's refusal to grant a defendant's request to respond to a *per diem* argument, which was mentioned for the first time in closing argument by plaintiff's attorney, does constitute reversible error.).

B. HEDONIC DAMAGES (LOSS OF ENJOYMENT OF LIFE)

What is the "value" of an individual's life? How can the lost value of life be argued in closing? Hedonic damages, also referred to as damages for the loss of enjoyment of life, compensate the plaintiff for the intangible value of loss of life.[14] Advocates of hedonic damages argue that court awards for lost wages and pain and suffering fall short of making the plaintiff whole.[15] Moreover, supporters of hedonic damages assert that life is inherently worth more than just a person's earning potential.[16] In many courts, however, the value of a human being is not recognized as hedonic advocates would hope. According to the laws of many states, your life is worth no more than your annual salary.[17] With the exception of Georgia, Connecticut, Mississippi, and New Mexico, and 42 U.S.C. § 1983 cases,[18] if a person is injured or killed and has lost all of his or her future enjoyment of life, but has no lost income, that individual, or his or her survivors, stand little chance of collecting anything for the value of that individual's life.[19]

At least one federal court has refused to recognize hedonic damages.[20] In a wrongful death case, the Florida District Court stated: "The court is of the opinion that there is no cause of action for hedonic damages in Florida. The court must follow the guidelines established by [Florida statutes] and Florida case

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[14] Virginia Smith Gautier, Comment, *Hedonic Damages: A Variation in Paths, the Questionable Expert and a Recommendation for Clarity in Mississippi*, 65 MISS. L.J. 735, 736 (1996). The word "hedonic" is derived from the Greek word "hedonikos" referring to one of the ancient Greek schools of philosophy that extolled the virtues of pursuing life's pleasures. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 837 (3d ed. 1992).

[15] Gautier, *supra* note 14, at 736–37.

[16] *Id.*

[17] *See* Stan V. Smith, *Measuring the Loss of Enjoyment of Life in Personal Injury Cases in Washington—Hedonic Damages*, TRIAL NEWS, Jan. 1997, at 29.

[18] 42 U.S.C. § 1983 (2000) (stating "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.").

[19] Smith, *supra* note 17, at 29.

[20] Brown v. Seebach, 763 F. Supp. 574, 583 (S.D. Fla. 1991).

law until such time as the Supreme Court or the Florida legislature decides differently."[21]

In the aviation context, a Michigan District Court ruled that under the Michigan Wrongful Death Act, hedonic damages were not recoverable for a decedent.[22] In that case, the decedent was a pilot who was killed when the plane crashed into trees.[23] Before the damages phase of the trial, the decedent's survivors filed a motion for hedonic damages.[24] The court explained that, in Michigan, hedonic damages are reserved solely for a living and permanently injured person.[25] Here, the court found that there was an insufficient amount of time between the crash and the pilot's death to allow for an award of hedonic damages.[26] The court noted that the decedent was, however, entitled to damages for emotional distress as an element of pain and suffering in the moments before his death.[27]

States that recognize damages for the loss of enjoyment of life differ on whether it should be argued as a separate element of damages, or whether it should be considered a part of the damages for pain and suffering or permanent injury. Thus, it would be wise to check the local rules to determine if hedonic damages may be argued, and if so, whether they may be asserted as damages independent of pain and suffering.

Loss of enjoyment of life arguments invariably led to the development and creation of the hedonics expert. The idea of presenting expert testimony that could assign a mathematical value to the loss of enjoyment of life in personal injury and wrongful death cases began drawing attention in the mid to late 1980s.[28] A small group of forensic economists began to develop ways to apply cost benefit analysis to tort damages using economics, statistics, real growth rate, present value tables, and life expectancy charts. Articles and books were written, and the so-called "hedonics expert" was born.

Although the concept of hedonic damages itself has gained acceptance in some jurisdictions, the notion that an "expert"

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[21] *Id.*

[22] Brereton v. United States, 973 F. Supp. 752, 756 (E.D. Mich. 1997).

[23] *Id.* at 754.

[24] *Id.*

[25] *Id.* at 756.

[26] *Id.* at 757.

[27] *Id.*

[28] Jeff McKean, *Expert Testimony on Hedonic Damages Lacks Court Acceptance*, IND. LAW., Jan. 22, 1997, at 23.

witness can testify to the value which a jury should assign for hedonic damages has been almost universally rejected.[29] Interestingly, some courts within the same jurisdiction have allowed the testimony in one case, only to exclude it in the next.[30] This has led to uncertainty among attorneys as to how they can best prove, or disprove, claims of hedonic damages in the courtroom.

In *Sherrod v. Berry*, the Federal District Court for the Northern District of Illinois determined that economist Stan V. Smith's expert testimony on hedonic damages was not speculative and upheld it as "enabl[ing] the jury to perform its function in determining the proper measure of damages in the case."[31] The court ruled that hedonic value testimony was invaluable to the jury and that it did not invade its province as the defense had argued.[32] By contrast, just six years later, in *Mercado v. Ahmed*, the same court refused to allow Stan V. Smith to testify as an expert on the measure of hedonic damages.[33] The *Mercado* court opined that before allowing any expert to testify, the "reliability and validity" of any proffered expert testimony had to be carefully considered on topics that had not been uniformly accepted in the scientific or legal community.[34] Since there was neither "basic agreement among economists as to what elements ought to go into the life valuation," nor proof of reliability, the court excluded the expert's testimony on the plaintiff's loss of enjoyment of life.[35]

The decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[36] directly affected the issue of admissibility of expert testimony in hedonic damages cases. *Ayers v. Robinson*[37] provides a comprehensive example of a case in which the *Daubert* factors were applied to determine the admissibility of expert testimony on loss of enjoyment of life. In *Ayers*, the defendant made a motion to

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[29] *Id.*

[30] *Compare* Sherrod v. Berry, 629 F. Supp. 159 (N.D. Ill. 1985) (allowing expert testimony on hedonic damages) *with* Mercado v. Ahmed, 756 F. Supp. 1097 (N.D. Ill. 1991) (excluding expert testimony on hedonic damages).

[31] *Sherrod*, 629 F. Supp. at 164. In *Sherrod*, the hedonic award was for $850,000, in addition to lost earnings of $300,000 and loss of society and companionship of $450,000. *Id.* at 160.

[32] *See id.* at 164.

[33] *Mercado*, 756 F. Supp. at 1103.

[34] *Id.* at 1101–02.

[35] *Id.* at 1103.

[36] 509 U.S. 579 (1993).

[37] 887 F. Supp. 1049 (N.D. Ill. 1995).

exclude the plaintiff's expert from testifying on hedonic damages on the grounds that *Daubert* precluded such testimony.[38] In determining whether the witness could testify, the court subjected each factor that the expert typically relied upon in reaching his final figure to a *Daubert* analysis.[39] After reviewing the various methods employed by the expert, the *Ayers* court soundly rejected the argument that the techniques used to evaluate the worth of a person's life were scientific.[40] The court determined that the seemingly endless possible variance in results makes this type of expert testimony imprecise and speculative.[41] Since *Daubert*, other federal decisions on the question of whether hedonic damage "experts" can testify have become more uniform in excluding expert witness testimony on hedonic damages after applying the *Daubert* standard.[42]

Although federal courts appear to be excluding expert testimony on hedonic damages in light of *Daubert*,[43] it is uncertain how state courts will rule when faced with this evidentiary dilemma. Presumably, if the language of a state's rule of evidence is similar to Federal Rule 702,[44] the state court may apply a *Daubert* analysis in reaching its own decision. If a state's evidentiary rule is strikingly different from the federal rule, it may be difficult to convince a state court judge to exclude such "expert" testimony on the grounds that it is unreliable and lacks probative value.

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[38] *Id.* at 1051.

[39] *Id.* at 1059–64.

[40] *Id.* at 1064.

[41] *See id.*

[42] *See, e.g.*, Sullivan v. U.S. Gypsum Co., 862 F. Supp. 317, 319 (D. Kan. 1994) (applying *Daubert* principles to preclude testimony of plaintiff's expert witness); Hein v. Merck & Co., 868 F. Supp. 230, 235 (M.D. Tenn. 1994) (stating expert testimony regarding hedonic damages was "unreliable and invalid" in light of *Daubert*); Chustz v. J.B. Hunt Transp., Inc., 659 So. 2d 784, 785 (La. Ct. App. 1995) (excluding expert testimony as to value of life); Wilt v. Buracker, 443 S.E.2d 196, 200 (W. Va. 1993) (noting that since West Virginia's Rule 702 is identical to Federal Rule 702, a *Daubert* analysis was material in determining whether hedonic expert could testify), *cert. denied*, 114 S. Ct. 2137 (1994).

[43] For pre-*Daubert* cases that barred expert testimony on hedonic damages, see Fetzer v. Wood, 569 N.E.2d 1237, 1247 (Ill. App. Ct. 1991) (excluding expert testimony on hedonic damages on grounds that hedonic damages "are not amenable to . . . analytical precision").

[44] Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

C. WALK A MILE IN PLAINTIFF'S SHOES

"How would you feel if you were in the same situation as Mr. Passenger?" This type of argument, often referred to as the "Golden Rule" argument, "suggests . . . jurors . . . put themselves in the shoes of one of the parties."[45] A majority of courts find that such an argument is impermissible because it encourages the jurors to decide the case on the basis of personal interest and sympathy rather than on the evidence.[46]

Although some courts have held that the "Golden Rule" argument is not improper *per se*, an attempt to undermine the neutrality of a jury by asking its members "to place themselves in the plaintiffs' position and urg[ing] them to award an amount of money they would desire if they had been the victim[ ]" is certainly grounds for reversal.[47] The key to an impermissible "Golden Rule" argument is when the argument "strike[s] at th[e] sensitive area of financial responsibility and hypothetically request[s] the jury to consider how much they would wish to receive in a similar situation."[48]

In one aviation wrongful death case, a Florida court found that the use of a "Golden Rule" argument in the plaintiff's closing statement constituted a "blatant, direct appeal for sympathy."[49] However, despite the plaintiff's improper remarks, the court concluded that, although the jury award was substantial, it was not excessive because there was credible evidence in the record to support the amount of personal injury damages.[50]

Likewise, in *Smith v. Piedmont Airlines, Inc.*,[51] plaintiff's counsel remarked during his summation to the jury that, in awarding

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[45] Simmonds v. Lowery, 563 So. 2d 183, 184 (Fla. Dist. Ct. App. 1990).

[46] Metro. Dade County v. Zapata, 601 So. 2d 239, 241 (Fla. Dist. Ct. App. 1992); *Simmonds*, 563 So. 2d at 184.

[47] *See* Coral Gables Hosp., Inc. v. Zabala, 520 So. 2d 653, 653 (Fla. Dist. Ct. App. 1988).

[48] Schaffer v. Ward, 510 So. 2d 602, 603 (Fla. Dist. Ct. App. 1987).

[49] Arnold v. E. Air Lines, Inc., 681 F.2d 186, 196 (4th Cir. 1982).

[50] *Id.* at 200–01. The compensatory damages awards were $3,027,500 for the personal injuries of one of the plane's passengers and $1,137,500 for the other passenger. *Id.* at 200. "The fault specifically admitted by [the airline] as the basis for its liability was the failure of the pilots to be aware of the plane's altitude immediately prior to the crash" which was corroborated by on-board and airport recorders. *Id.* at 190 n.1. The trial judge characterized the pilot's inattention and carelessness as "a shocking lack of attentiveness," "unattentiveness and carelessness of a truly extraordinary nature," and "not simply inadvertent but grossly negligent." *Id.*

[51] 728 F. Supp. 914 (S.D.N.Y. 1989).

the proper amount of damages, "[y]ou have to try to feel what [the plaintiff] must be going through."[52] The court found plaintiff's comments to be a mere plea to the jury to consider the amount of pain the plaintiff experienced.[53] The court concluded the plaintiff's attorney was encouraging the jury to award appropriate damages, not attempting to arouse the sympathy of the jury.[54] The court noted that, to the extent that these comments were improper, they "were cured by the [trial] court's charge to the jury . . . to weigh and consider the evidence without regard to sympathy, prejudice, or passion, for or against any party."[55]

Thus, there is a fine line counsel must walk when asking the jury to consider his or her client's position. Counsel may ask the jury to use their common sense to evaluate the positions of the parties but cannot ask the jury to consider what they feel that they would be entitled to if they were in the shoes of either party.

D. Impassioned Statements about the Case

Attorneys often employ the tactic of using strong and zealous language during closing arguments to leave a lasting impression on the jury. Depending on the scope and inflammatory nature of the language used, this tactic could backfire if an appeal is later raised requesting a new trial. In addition, the codes of professional ethics in a majority of states prohibit attorneys from injecting unnecessary personal comments into the litigation. For example, Rule 4-3.4 of the Rules of Professional Conduct for the Florida Bar states that it is improper for trial counsel to

> allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the culpability of a civil litigant, or the guilt or innocence of an accused.[56]

The Florida District Court of Appeal specifically cited this rule in *Bellsouth Human Resources Administration, Inc. v. Colatarci*[57] when determining the propriety of remarks made by attorneys

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[52] *Id.* at 919.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] R. Regulating Fla. Bar 4-3.4(e).
[57] 641 So. 2d 427 (Fla. Dist. Ct. App. 1994).

on both sides during closing arguments.[58] In that case, the defense counsel made an aggressive attack on the plaintiff's lawyers in his closing argument, suggesting that the "bringing of frivolous lawsuits was one of the major ills of our society."[59] During plaintiff's rebuttal argument, he directly addressed the remarks made by the defense counsel: "I understand [defense counsel] said it himself, corporate America. You know, the folks that brought you the gas tank that explodes, and agent orange, and silicone breast implants."[60] In ruling on these comments, the court of appeal severely reprimanded both attorneys, held them in direct violation of rule 4-3.4(e), and mandated a new trial.[61]

Additionally, courts usually do not tolerate comments that attack the resources of a corporate defendant. In *Wellner v. New York Life Insurance Co.*,[62] the Illinois Appellate Court stated that "[t]hough it may be common knowledge that the defendant is a company of vast resources, it does not justify emphasis of that fact in an argument to the jury, which can only have a tendency to prejudice the jury against th[e] defendant."[63]

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[58] *Id.* at 429.

[59] *Id.* The defense counsel's remarks included:

> It is, indeed, I think, alarming that trial lawyers will . . . hope to be able to get [the] six members of the jury to give them $1,500,000 for a broken leg. It seems to say I think a lot about the deterioration of our society.
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> . . . .
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> . . . [I]t says a great deal about the deterioration of our system, a broken leg a million dollars. A broken leg a million and a half dollars. What is it about our system that has created a situation that every time we do something if it doesn't turn out the way we thought we sue?

Id.

[60] *Id.* at 428.

[61] *Id.* at 429–31. It is interesting to note that the Court of Appeal also rebuked the trial court for not sustaining the objections of counsel in this case:

> It is exasperating that, no matter how many times appellate courts cite this well-known rule [rule 4-3.4(e)], trial counsel and trial judges do not seem to get the message. . . .
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> . . . .
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> It is the trial court's responsibility, when objections are made to improper argument, to sustain the objections and let counsel know that these tactics will not be tolerated.

Id. at 430.

[62] 73 N.E.2d 156 (Ill. App. Ct. 1947).

[63] *Id.* at 159. In this case, plaintiff's counsel had remarked:

> Now, fortunately, at this particular stage of the game, why, the New York Life Insurance Company, or any other large corporation

It seems that as long as the statements are not highly prejudicial or of an overly aggressive nature, most courts are willing to grant attorneys wide leeway in their closing arguments. As one court aptly stated:

> In a case . . . involving a horrible human tragedy and almost immeasurable loss, it must be expected that counsel during closing summation to the jury will engage in sometimes emotional and heated debate. Counsel are accorded a wide latitude in making arguments to the jury, and unless their remarks are highly prejudicial and inflammatory, counsel's statements made to the jury during closing arguments will not serve as a basis for reversing a judgment.[64]

Likewise, the court in *Anderson Aviation Sales Co. v. Perez*,[65] similarly stated: "The granting of a new trial because of the misconduct of counsel in closing argument is only sparingly granted. It should never be granted for a disciplinary measure, but only to prevent a miscarriage of justice."[66]

The court's opinion in *Cohen v. Lowe Aviation Co.*[67] demonstrates the reluctance of most courts to overturn a case based on an attorney's remarks during closing argument. In that case, the plaintiff complained that the defense counsel used grossly improper regionalisms to align himself with the jury.[68] Specifically, during closing argument, the defense counsel "exhorted the jury not to send [plaintiff's] counsel back to New York with a croker sack full of money."[69] The court found that such a trial

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> stands on an even keel or stands even Stephen with an individual, as [the plaintiff] and at this particular time, why, they don't have the advantage of their vast resources to secure photostatic copies.

Id.

[64] Metro. Dade County v. Dillon, 305 So. 2d 36, 40 (Fla. Dist. Ct. App. 1974); *see also* Broge v. State, 288 So. 2d 280, 281 (Fla. Dist. Ct. App. 1974); Lovell v. Henry, 212 So. 2d 67, 67 (Fla. Dist. Ct. App. 1968); Wise v. Jacksonville Gas Corp., 97 So. 2d 704, 707 (Fla. Dist. Ct. App. 1957).

[65] 508 P.2d 87 (Ariz. Ct. App. 1973). In that case, the plaintiff's attorney referred to the aircraft company in his closing argument as "the target defendant" and "the prime defendant." *Id.* at 94. He also explained that the company "would have been kicked out of court long ago if the case was without merit." *Id.* At this point in the argument, the court interrupted the attorney before any objection was raised and very pointedly admonished the jury as follows: "I will admonish the jury to disregard the last remarks of counsel as to whether there has been a prior ruling on whether you have or do not have a case to present to the jury." *Id.*

[66] *Id.* at 94.

[67] 470 S.E.2d 813 (Ga. Ct. App. 1996).

[68] *Id.* at 815.

[69] *Id.*

strategy was at a minimum "impolite and arguably unprofessional" but not so inflammatory as to have "blinded the jury to the eight days of evidence which was otherwise competently presented."[70]

In an aviation wrongful death case, the defendant alleged that the district court should have sustained its objections to certain statements made by the plaintiff's counsel in closing argument.[71] The comments about which the defense complained included the following:

> The nature of this lawsuit is what I would call a consumer protection type case; [The deceased] was killed because of their responsibility; We're here because of the responsibility of McDonnell Douglas in the manufacture of this aircraft; and She [the wife of deceased airline pilot] had Walter Lux, and they took him away.[72]

The court did not directly rule on the propriety of these statements, but did mention that "improper comments during closing argument rarely rise to the level of reversible error."[73]

Emotional and zealous statements may keep the jury's attention and demonstrate a passionate belief in your client's position which may sometimes convince a jury to return a verdict in your favor. However, these comments may also convince an appellate court to order a new trial.

E. Evidence

1. *Photographs*

Gruesome photos are ripe for motions *in limine* by the defense. Most jurisdictions seem to allow photographs of the decedent so long as there is some relevance to the claim or defense. For example, photos of the burned decedent on the autopsy table may be admitted if evidence supports the plaintiff's claim that the decedent survived the impact. The defense, of course, may stipulate that the decedent was burned and died as a result of the accident, and move to exclude the photos, arguing that

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[70] *Id.* at 815–16.

[71] *In re* Air Crash Disaster near Chi., Ill., on May 25, 1979, 803 F.2d 304, 317 (7th Cir. 1986). In this case, the widow of an airline pilot, killed in an airplane crash en route to Los Angeles, brought a suit against an aircraft manufacturer for compensatory damages. *Id.* at 306–07.

[72] *Id.* at 317.

[73] *Id.* The court decided that since there was going to be a new trial on damages, it would leave it to the district court on remand to "guard against any [other] improper statements." *Id.*

the extent of the burning does not prove consciousness nor is it representative of the suffering sustained by the decedent. Assuming the photos are admitted, reference to them in closing argument should be guarded. More often than not, the photos had their desired effect on the jury during the case in chief, and their effect will not be lost upon the jury by the time of closing arguments. Further reference to the photos by either party during closing could run the risk of sensationalizing the case or offending the jury. This is particularly true if the testifying medical examiner conceded, for example, that the burns in the photo do not prove consciousness, or exceed the threshold that any human could have endured. Thus, the use of gruesome photos during closing argument should be limited to those instances where the photo truly proves a claim or defense.

2. Exhibits

At the appropriate places during closing argument, counsel should use those exhibits admitted into evidence which corroborate and highlight the main points of the closing argument. Holding up evidence and displaying it for a jury keeps their attention while concentrating and solidifying counsel's case. This concept works well for the plaintiff when using photos, films, and other sympathetic evidence related to the decedent's family to support a damages argument. Generally, it is more difficult for the defense to use tangible evidence in a closing argument related to damages. References to income history summary charts and the opposing party's economists' reports, particularly if the methodology is suspect, should strongly be considered.

The more difficult question becomes whether a litigant may use demonstrative evidence during closing argument that was not introduced as evidence during the trial. In Louisiana, charts, models, sketches, and even a cartoon have been permitted during closing argument, even when not in evidence. In *Schwamb v. Delta Air Lines, Inc.*, the plaintiff was struck by a suitcase which fell out of an overhead bin.[74] "In closing argument, plaintiffs' counsel showed the jury a magazine advertisement or cartoon, which had not been admitted in evidence, as an example of how easily Delta could have warned its passengers of the danger presented by overstuffed or improperly loaded overhead

[74] 516 So. 2d 452, 456 (La. Ct. App. 1987).

luggage bins."[75] The Louisiana Court of Appeal held that "[i]t is within the discretion of the trial court to permit counsel to illustrate his or her remarks to the jury with reasonable demonstrative aids, such as blackboards, charts, models, sketches and the like, as long as such aids are relevant, and are not unduly inflammatory, misleading or prejudicial."[76]

Although the use of props not admitted into evidence during closing argument creates a risk of diverting the jury's attention to facts not properly before it, there is no rule barring counsel's use of "rhetorical devices, be they linguistic or in the form of visual aids."[77] "[A]s long as there is no reasonable likelihood that the . . . device [used by counsel] will confuse the jury or . . . prejudice the opposing party," attorneys are given considerable leeway with the use of props in closing argument.[78] However, counsel is still cautioned to familiarize themselves with the specific law in their jurisdiction, as well as the preferences of local judges regarding the use of demonstrative evidence during closing argument.

3. Experts

Arguing damages in an aviation wrongful death case would not be complete without its share of expert witnesses. It is likely that in cases involving numerous expert witnesses, comments discrediting the other side's experts will be made in closing arguments. Courts typically do not find these kinds of comments to be so prejudicial or inflammatory as to warrant a new trial.[79] For example, in one aviation case, the plaintiff's counsel "assailed the credibility of the defense expert . . . when he discussed the amount paid to [the defense expert doctor] for his services."[80] The court stated that "[w]hile his remarks may have

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[75] *Id.* at 463. The advertisement, from *Newsweek* magazine, contained a cartoon depiction of "a suitcase falling from an overhead airplane luggage compartment onto a . . . businesswoman, and was captioned: My Financial Partner? New England Life, of course. Why?" *Id.* at 464 n.9.

[76] *Id.* at 464.

[77] State v. Ancona, 854 A.2d 718, 737 (Conn. 2004).

[78] *Id.* at 737–38. *See, e.g.*, Laney v. State, 515 S.E.2d 610 (Ga. 1999) (allowing prosecutor to use bag of sugar not introduced into evidence to demonstrate amount of force necessary to pull trigger of murder weapon); People v. Dowds, 625 N.E.2d 878 (Ill. App. Ct. 1993) (allowing prosecutor in a drunk driving case to use beer mug and large pitcher, not admitted into evidence, to demonstrate amount of beer that defendant allegedly had consumed).

[79] *See* Smith v. Piedmont Airlines, Inc., 728 F. Supp. 914, 920 (S.D.N.Y. 1989).

[80] *Id.*

been 'inelegant, tasteless, [and] offensive,' they did not go so far as to imply that [the defense expert doctor] would have testified to anything for the right price."[81] The court went so far as to say, "the rule confining counsel to legitimate argument is not based on etiquette, but on justice."[82]

In *O'Donnell v. Holy Family Hospital*,[83] plaintiff's counsel did go so far as to imply that the defense's expert would have testified to anything for the right price. In this case, the court found that the plaintiff's comments regarding the defense's expert doctor as a "hired gun" and arguing that the doctor would "say whatever it takes for the paycheck he picks up" were improper and unprofessional.[84] However, the court concluded that the plaintiff's argument was not sufficiently prejudicial to warrant a new trial.[85] Other courts have similarly found that comments insinuating that experts were "the best experts that money can buy" and had "a significant financial interest" in the case were not so improper as to warrant a new trial.[86] Thus, discrediting the opposing party's expert witness, while improper and unprofessional according to the trial courts, rarely warrants mandating a new trial on appeal.

4. Witnesses

In making closing arguments, most attorneys want to discredit the opposing side's witnesses and will highlight to the jury any flaws from the witnesses' testimony or character in general. This may be a prevalent issue in cases where an attorney refers to the opposing side's witness as a "liar." Whether the attorney crosses the line when labeling the witness a "liar" is more "a question of degree as opposed to a bright-line rule. The frequency with which the infractions are repeated during closing argument may be determinative of any error in closing argument."[87] Generally, however, calling a witness a "liar" is not improper when sup-

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[81] *Id.* (quoting Arnold v. E. Air Lines, Inc., 681 F.2d 186, 195 (4th Cir. 1982)).

[82] *Id.* (quoting Gutin v. Frank Mascali & Sons, 198 N.Y.S.2d 492, 502 (Sup. Ct. 1960)).

[83] 682 N.E.2d 386 (Ill. App. Ct. 1997).

[84] *Id.* at 397.

[85] *Id.*

[86] Jacobs v. Union Pac. R.R., 683 N.E.2d 176, 178 (Ill. App. Ct. 1997); *see also* Ellington v. Bilsel, 626 N.E.2d 386, 390 (Ill. App. Ct. 1993) (finding references to expert as "polished" and "a performer" were not as inflammatory as the "hired gun" line of cases); Moore v. Centreville Twp. Hosp., 616 N.E.2d 1321, 1332 (Ill. App. Ct. 1993) (finding "hired gun" type of comment was not improper).

[87] Montz, *supra* note 3, at 120.

ported by record evidence.[88] As the Florida Supreme Court noted,

> it is not proper for counsel to state during closing argument that a witness 'lied' or is a 'liar'. . . [but] [i]f the evidence supports such a characterization, counsel is not impermissibly stating a personal opinion about the credibility of a witness, but is instead submitting to the jury a conclusion that reasonably may be drawn from the evidence.[89]

Some courts, however, have established more of a bright line rule against characterizing witnesses as "liars" in closing argument. In *Olenin v. Curtin & Johnson, Inc.*,[90] the court emphatically stated, "[i]t is unprofessional conduct, meriting discipline by the court, for counsel either to vouch for his own witness or to categorize opposing witnesses as 'liars'; that issue is for the jury."[91] State and federal courts appear to remain sharply divided on whether counsel may refer to a witness as a "liar" in closing argument.

Another area for potential improper argument lies where a party may comment on the other party's failure to call a witness

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[88] See Mason v. Mitchell, 95 F. Supp. 2d 744, 781 (N.D. Ohio 2000) (finding use of the word "preposterous" not inflammatory) which provides the following examples: United States v. Francis, 170 F.3d 546, 551 (6th Cir. 1999) ("not improper for prosecutor to assert that defendant is lying"); Kellogg v. Skon, 176 F.3d 447, 451–52 (8th Cir. 1999) ("improper for prosecutor to call defendant 'monster,' 'sexual deviant,' and 'liar,' but no prejudice shown where weight of evidence against defendant was heavy"); United States v. Shoff, 151 F.3d 889, 893 (8th Cir. 1998) ("not improper for prosecutor to call defendant a 'con man' and 'liar'"); Williams v. Borg, 139 F.3d 737, 744–45 (9th Cir. 1998) ("not improper for prosecutor to call defendant 'stupid' and to refer to defense counsel's argument as 'trash'"); United States v. Collins, 78 F.3d 1021, 1039–40 (6th Cir. 1996) ("improper for prosecutor to state that defense counsel deserved an Academy Award for keeping a straight face when he made his arguments, but no prejudice shown where weight of evidence against defendant was heavy"); United States v. Reliford, 58 F.3d 247, 250 (6th Cir. 1995) ("not improper for prosecutor to characterize defendant's testimony as 'unbelievable,' 'ridiculous,' and 'a fairy tale'"); United States v. Davis, 15 F.3d 1393, 1402–03 (7th Cir. 1994) ("not improper for prosecutor to refer to defendant's case as 'trash,' 'hogwash,' and 'garbage'"). *See also* United States v. Catalfo, 64 F.3d 1070, 1080 (7th Cir. 1995) (holding that a prosecutor's description of the defendant as a liar was not improper); H. Patrick Furman, *Avoiding Error in Closing Argument*, 24 COLO. LAW. 33, 33–34 (1995) (A "statement that a witness 'lied' during his or her testimony has been held inappropriate, as has a statement that a witness was 'honest.'").

[89] Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028 (Fla. 2000).

[90] 424 F.2d 769 (D.C. Cir. 1968).

[91] *Id.* at 769.

if the witness was peculiarly available to the other side.[92] In one aviation case, the defense contended that the "plaintiff's repeated statements regarding defendant's failure to call certain witnesses . . . implied that defendant had not been completely candid in its presentation of the case."[93] The court stated that "during summation, counsel may comment on a party's failure to call a witness under its control whose testimony was expected to have been favorable."[94]

Yet, not all courts agree with that court's conclusion.[95] The Minnesota Supreme Court has observed that "such comment might suggest to the jury that defendant has some duty to produce witnesses or that he bears some burden of proof."[96]

> In order to comment on a missing witness, generally two requirements must be met. First, it must be shown that the party failing to call the witness has it peculiarly within its power to produce the witness. Second, the witness's testimony must "elucidate" issues important to the trial, as opposed to being irrelevant or cumulative.[97]

Counsel may also make reference to records that opposing counsel failed to produce at trial. When a party fails to produce relevant documents or other evidence, and it is shown that the party has some special ability to produce such evidence, opposing counsel is free to point that failure out to the jury.[98] It is reversible error to suggest concealment of records, but it is permissible to note the records are missing.[99]

During closing argument, a lawyer is permitted to make "fair comment" about the evidence and the law, which includes reasonable inferences that may be drawn from the evidence. This includes characterization of the other side's witnesses as "liars"

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[92] *See* United States v. Carroll, 871 F.2d 689, 692 (7th Cir. 1989); *see also* Myre v. Kroger Co., 530 N.E.2d 1122, 1124–25 (Ill. App. Ct. 1988) (stating that the failure of an opponent to put on a key witness, not equally available to both parties, raises a negative inference and may be commented on by counsel in closing argument).

[93] Smith v. Piedmont Airlines, Inc., 728 F. Supp. 914, 919 (S.D.N.Y. 1989).

[94] *Id.*

[95] *See, e.g.*, Ross v. State, 803 P.2d 1104, 1105–06 (Nev. 1990) (stating that the missing witness argument may be an improper shifting of the burden of proof to the defense because, in essence, it tells "the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence").

[96] State v. Caron, 218 N.W.2d 197, 200 (Minn. 1974).

[97] Montz, *supra* note 3, at 121.

[98] United States v. Pitts, 918 F.2d 197, 199–200 (D.C. Cir. 1990).

[99] Brief of Defendant–Appellee at 20–22, Gammonley v. Patel, 797 N.E.2d 242 (Ill. App. Ct. 2001) (No. i-99-3925).

when supported by the evidence, as well as "negative inferences" that may arise from one party's failure to produce witnesses or records within their control.

5. Special Interrogatories

A topic that typically gets little attention is the discussion, during closing argument, of special verdict forms or special interrogatories. Generally, it is not misconduct for an attorney to read and discuss, in his closing argument, interrogatories which the court had indicated an intention to submit to the jury, and to "point[ ] out what answers ought to be returned thereto."[100]

On the other hand, most jurisdictions state that a jury should not be informed of the legal effect of its answers to special interrogatories.[101] The general rule prohibits attorneys from informing the jury of the effect of their findings.[102] This rule is designed to prevent an appeal to jurors to abandon their duty to answer the questions according to the evidence, and to answer them so that a particular desired result will be achieved. For example, plaintiff's counsel cannot state in closing argument that the reason defendants wanted the jury to answer the first question "no," was because they knew that such a response would end the case.[103]

It is also improper for an attorney to tell the jury that it needs to be consistent when it answers a special interrogatory.[104] That is, that its special verdict must be consistent with the general verdict.[105] However, it is proper for counsel to urge the jury, based on the evidence, to answer the interrogatory in favor of their client.[106]

F. Experiments, Stories, and Analogies

Although, in a majority of jurisdictions, lower courts have discretion regarding the extent to which counsel may illustrate his or her remarks to the jury, some appellate courts have limited that discretion. In one such case, the appellant alleged that the trial court erred in failing to grant a mistrial in light of defense

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100 Clear Creek Stone Co. v. Carmichael, 73 N.E. 935, 937 (Ind. Ct. App. 1905).

101 Sommese v. Maling Bros., Inc., 222 N.E.2d 468, 470 (Ill. 1966).

102 Galveston, H. & H.R. Co. v. Fleming, 203 S.W. 105, 108 (Tex. Civ. App.—Galveston 1918, writ dism'd).

103 *Id.*

104 Blevins v. Inland Steel Co., 535 N.E.2d 972, 976 (Ill. App. Ct. 1989).

105 *Id.*

106 *Id.*

counsel's closing remarks regarding injuries allegedly suffered when his client's cologne ignited.[107] During closing argument, defense counsel poured a substance, purportedly the same cologne that the plaintiff was wearing at the time of his injury,

> onto his arm, lit a match and passed it over the doused arm while stating: . . . "Let's see how he did it. God, if I am wrong, burn me. . . . I urge you to believe the evidence of your eyes. If you have any doubt about it, try it for yourselves. Upon normal application, the product is not flammable."[108]

The appellate court stated that the defense counsel's experiment "was reasonably calculated to cause the rendition of an improper judgment."[109] The appellate court reversed and remanded, recognizing that even an instruction from the court would not have eliminated from the juror's minds the combined visual and oral effect of defense counsel's experiment.[110]

Numerous articles and journals on closing arguments encourage attorneys to use stories or analogies in their closing remarks.[111] However, it is important to be cautious when telling a story or using an analogy because the mental image perceived by a judge or jury may be different than the one intended by the attorney.[112] For example:

> A criminal defense lawyer is making his closing argument to the jury. His client is accused of murder, but the body of the victim has never been found. He dramatically withdraws his pocket watch and announces to the jury, "Ladies and gentlemen, I have some astounding news. We have found the supposed victim of this murder alive and well, and, in exactly one minute, he will walk through that door into this courtroom." A hushed silence falls over the courtroom, as everyone waits for the momentous entry. Nothing happens. The lawyer then says, "The mere fact that you were watching that door, expecting the victim to walk into this courtroom, suggests that you have a reasonable doubt whether a murder was committed." Pleased with the impact of the stunt, he then sits down to await an acquittal. The jury is instructed, files out and files back in 10 minutes later with a verdict finding the defendant guilty. Following the proceedings, the

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[107] Howard v. Faberge, Inc., 679 S.W.2d 644, 649 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[108] *Id.* at 649.

[109] *Id.*

[110] *Id.* at 650.

[111] *See* James H. Seckinger, *Closing Argument*, 19 AM. J. TRIAL ADVOC. 51, 61–69 (1995).

[112] *Id.* at 68.

astounded lawyer chases after the jury foreman to find out what went wrong. "How could you convict?" he asks. "You were all watching the door!" The foreman explains, "Most of us were watching the door. But one of us was watching the defendant, and he wasn't watching the door."[113]

Therefore, experiments and stories during closing must be used cautiously as they may result in reversal, conviction, or liability determination, instead of an inventive and clever victory.

G. INSURANCE

Generally, references to a defendant's insurance coverage have long been excluded in civil proceedings. The reason for this exclusion is to prevent jurors from attaching "liability where none exists, or to arrive at an excessive amount through sympathy for the injured party and the thought that the burden would not have to be met by the defendant."[114] Statements during closing arguments that suggest the absence of insurance are seen as an effort to invoke sympathetic feelings, and a myriad of courts have found that an attorney's statements that his client must personally pay a judgment are improper.[115] For instance, in *Koonce v. Pacilio*,[116] defense counsel had stated that "everything [the defendants have] gotten is threatened because of a possible verdict [which could be] a potential 'tragedy to the [defendants] depending on how this case goes.'"[117] The court concluded that counsel's suggestion that defendants had no insurance and would be personally responsible for judgment was prejudicial.[118]

Yet courts are less likely to find that the reference to insurance warrants a reversal when the reference is rare, isolated, and unique.[119] This principle was applied in *Melara v. Cicione*, where

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[113] Montz, *supra* note 3, at 88–89.

[114] Carls Mkts., Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953).

[115] Montz, *supra* note 3, at 127.

[116] 718 N.E.2d 628 (Ill. App. Ct. 1999).

[117] *Id.* at 634.

[118] *Id.* at 635.

[119] *See* Johnson v. Canteen Corp., 528 So. 2d 1364, 1365 (Fla. Dist. Ct. App. 1988) (no reversal for new trial for two references alluding to workers' compensation insurance where there was no disclosure to jury that plaintiff had been compensated for her injury); *see also* S. Motor Co. v. Accountable Constr. Co., 707 So. 2d 909, 911 (Fla. Dist. Ct. App. 1998) (reversed for new trial where, over the defendant's standing objection, the plaintiff was permitted to introduce *pervasive* and *extensive* evidence of the existence and amount of the defendant's insurance coverage in a breach of contract action); Auto-Owners Ins. Co. v. Dewberry, 383

the appellants appealed "an unsolicited reference to an insurance adjuster made by one of the appellee's treating physicians."[120] The court found that such an insular reference to an insurance adjuster was harmless error.[121] In addition, because the issue before the jury turned on contested injury damages, the court rationalized that the outcome of the case turned on a battle of the experts and not on the passing reference of the existence of insurance.[122]

One exception to this rule that seems to go against its purpose is that, while the mention of insurance may be prejudicial toward a defendant, a defendant can voluntarily offer this information to the jury. For example, it is permissible for the defense to take the risk of injecting the existence of insurance during its closing argument. This occurred in *Bray v. Bi-State Development Corp.*,[123] where the defense counsel stated during closing argument, "[y]es, we have insurance. Yes, we stand responsible to pay those people who we injure through our fault. But we're not here to pay for every bad thing that happens to every person who comes into the Arch garage."[124] The court determined that such an argument was proper because it was the defense counsel, and not plaintiff's attorney, who deliberately inserted the comment.[125]

Ultimately, even if courts could uniformly quantify the difference between rare and repeated references to insurance coverage during closing argument, there still remains a dispute as to whether a proper instruction could cure any prejudice created by such a reference.[126] Consequently, due to the lack of clearly

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So. 2d 1109, 1109 (Fla. Dist. Ct. App. 1980) (repeated references by the insured's counsel as to the amount of the policy limits during *voir dire*, opening argument, and closing argument constituted reversible error); Levin v. Hanks, 356 So. 2d 21, 22 (Fla. Dist. Ct. App. 1978) (repeated argument to jury that insurance company was in effect trying to recover for second time was improper and required reversal); Knowles v. Silasavage, 266 So. 2d 67, 68 (Fla. Dist. Ct. App. 1972) (plaintiff counsel's *voir dire* on the subject of insurance did not constitute prejudice for reversible error).

120 712 So. 2d 429, 431 (Fla. Dist. Ct. App. 1998).

121 *Id.*

122 *Id.*

123 949 S.W.2d 93 (Mo. Ct. App. 1997).

124 *Id.* at 101–02.

125 *Id.*

126 *See, e.g.*, Falkowski v. Johnson, 148 F.R.D. 132, 137 (D. Del. 1993) (holding that trial court's curative instructions did not remove any possible prejudice in automobile accident damages case arising from implied reference by trial counsel to insurance throughout closing argument).

defined judicially determined violations, "continuous improper argument and subsequent reversals regarding the mention of insurance are not merely probable: they are certain."[127]

III. HOW (OR WHETHER) TO ADDRESS DAMAGES

Whether to argue damages is not a difficult question for the plaintiff's attorney since damages are typically an element of the plaintiff's aviation wrongful death case. How much to ask the jury to return is a more difficult question that depends on the facts of the particular case, including how witnesses came across on the witness stand, whether damages documents support the request, the venue, and the demographic makeup of the jury. Asking the jury to award a disproportionately high number runs the risk of sounding offensively greedy, while asking for a number that is too low may portray a lack of confidence in the plaintiff's case.

With respect to defense attorneys, debate continues to circulate about whether to address damages during closing argument. Some defense attorneys fear that any discussion of damages implicitly carries with it an admission of liability. Many defense lawyers, however, recognize that in most cases there is at least some risk that the jury will return a verdict for the plaintiff on liability and that, for this reason, it would be imprudent to ignore damages.

Whether to argue damages from the defense side depends on many of the same factors listed above for plaintiff, and also on whether there are multiple defendants and whether your client is, or is perceived as, the target defendant. It necessarily also involves consistency in damages treatment in a contested liability case. For example, if you contested damages during trial by calling your own damages expert, then you would probably want to argue damages in closing. If you presented an alternative damages calculation to the plaintiff's economist, you would probably want to argue it in closing.

All else being equal, it seems as though *some* discussion of damages in a contested liability case should be considered, if for no other reason than to offer the jury a different damages number than that offered by the plaintiff's attorney. After all, if the jury does not accept your liability defense, then a jury has no number against which to compare the numbers placed on the

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[127] Montz, *supra* note 3, at 129.

board by the plaintiff. For example, in *Texaco, Inc. v. Pennzoil, Co.*,[128] the defense chose not to argue damages in closing argument.[129] The plaintiff's attorney, on the other hand, devoted persuasive argument for an award of significant damages and received an $11.1 billion verdict.[130] Thus, if the defense chooses not to address damages at trial, one very compelling risk is that the jury will be left with no direction concerning damages other than the arguments presented by the plaintiff's attorney.[131]

Again, however, the strength of the liability case and the myriad of factors listed above may warrant no discussion of damages at all in the defense's case. Perhaps a good compromise is to address the damages similar to the manner in which the attorney rebuts the other elements of the plaintiff's case. This approach has at least two side effects. The argument ends on a defensive point, and the argument also concludes on, perhaps, a perceived assumption that the defendant is liable. To avoid these pitfalls, defense counsel should organize the closing argument so as to end with a topic other than damages, discussing damages at some point in the middle of the closing argument.[132]

During closing, counsel should also consider explaining the verdict form to the jurors as they are often confused about their task once they enter the deliberation room.[133] One way to keep jurors on track regarding damages is to present the verdict form during closing and step jurors through it, question by question. Using the real verdict form, either via an enlarged poster or by projecting it onto a screen, can also be an effective way to explain the form from your point of view.

Though it is a good idea to work your defense strategy on damages into your theme of the case, to a certain extent, the decision to address damages may not be resolved until your closing argument. For example, what if the defense attorney makes a weak final argument, including a weak effort on the damages issues? Should plaintiff's counsel seek an amount higher in re-

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[128] Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768, 784 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[129] *See* Decision Quest, The Ghost of Pennzoil-Texas: Hidden Risks of Arguing Alternative Damages, http://www.decisionquest.com/litigation_library.php?NewsID=219 (last visited June 29, 2008).

[130] *Texaco*, 729 S.W.2d at 784.

[131] Kerry E. Notestine, *Closing Arguments*, 29 BRIEF 72, 75 (1999).

[132] Linda L. Listrom, American Bar Association Section of Litigation Annual Conference: Lasting Impressions: The Role of Closing Argument (Apr. 20–23, 2005).

[133] Notestine, *supra* note 131, at 73.

buttal than he had originally intended? What if the plaintiff puts on a compelling damages case, but the plaintiff's final argument is not as strong as it could have been, and your gut (or your expensive jury consultant) tells you that there was not a lot of emotion from the jury? If your plan was to argue damages, do you now abandon it?[134]

There is no right or wrong answer to the above questions. They are presented, however, to show that an attorney should remain flexible. Though it is a good idea to stick to your trial plan, there are simply times when that plan needs to be altered. Despite the modern discovery rules designed to prevent it, trials typically involve surprises. An attorney, plaintiff or defense, should assure that he remains flexible to consider changes to the final argument based on fluid changes in the trial, all the while staying consistent with his theory of the case.

IV. CONCLUSION

In summary, there is no hard and fast rule that works for a closing argument in every case. The considerations of what can be said regarding damages during closing argument in an aviation wrongful death case, and whether to address damages at all, is something that can only be decided by the trial lawyer, guided by the logic of cases similar to those discussed herein. Regardless of which side one is advocating, the closing argument should tie the entire trial together in a coherent, persuasive, and credible manner. Closing argument is the last opportunity to present to the jury one's perspective on the recommended damages award. It would be unfortunate for the attorney to win the battle at trial, only to lose the war on appeal because of an improper or erroneous comment made during closing argument.

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[134] One option is to consider foregoing any argument on damages and present a motion *in limine* after your argument to prevent plaintiff's counsel from addressing damages in his rebuttal argument.